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7 OLD REPUBLIC HOME PROTECTION
8 COMPANY, INC.,
9 Plaintiff,
10 v.
11 FRANK WINSTON CRUM INSURANCE
12 COMPANY,
13 Defendant.

Case No. [23-cv-05315-AMO](#)

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

Re: Dkt. Nos. 10, 11

14 Before the Court is Frank Winston Crum Insurance Company's motion to dismiss. The
15 matter is fully briefed and suitable for decision without oral argument. Accordingly, the hearing
16 set for May 16, 2024, is VACATED. *See Civil L.R. 7-1(b).* Having read the parties' papers and
17 carefully considered their arguments and the relevant legal authority, the Court hereby **GRANTS**
18 the motion, for the following reasons.

19 **I. BACKGROUND**

20 **A. Factual Background**

21 Plaintiff Old Republic Home Protection Company, Inc. ("ORHP") is a California
22 corporation that is licensed to provide home protection plans to homeowners in 30 states,
23 including Texas. Complaint (ECF 1-2) ("Compl." or "¶") ¶ 7.¹ Under ORHP's plans, when a plan
24 holder places a service call with ORHP regarding an issue with a covered appliance or system,
25 ORHP refers the call to an independent contractor to provide service. ¶ 8. ORHP then pays for

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27 ¹ Because the Court is considering a motion to dismiss pursuant to Federal Rule of Civil Procedure
28 12(b)(2), it accepts the factual allegations in Plaintiff's complaint as true. *See Schwarzenegger v.
Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

1 the cost of the work provided by the independent service provider. ¶ 8.

2 ORHP provided Keith and Robin Peshak (the “Peshaks”) with a plan for their Texas
3 residence. ¶ 9. The Peshaks placed a service request with ORHP in 2017, reporting that there
4 were water leaks in their pool and spa system. ¶ 10. ORHP referred the service call to Coolway
5 Mechanical Services Inc. (“Coolway”), an independent contractor, who attempted to repair the
6 pool system, and later the HVAC system. ¶¶ 11-14, 17. The Peshaks subsequently contacted
7 ORHP reporting that Coolway’s services caused damage to the residence. ¶¶ 15, 17-19. ORHP
8 informed the Peshaks that under the plan, any claims should be directed to Coolway. ¶¶ 16, 20.

9 On January 23, 2019, counsel for the Peshaks sent ORHP a letter demanding that ORHP
10 pay \$47,000 as compensation for the property damage caused by Coolway. ¶ 21. Coolway and
11 ORHP have a written agreement whereby Coolway defends and indemnifies ORHP for any claims
12 made against ORHP alleging damage caused by Coolway. ¶ 23. The agreement also requires
13 Coolway to obtain a comprehensive general liability policy to defend and indemnify Coolway
14 against claims made by plan holders. ¶ 23. Defendant Frank Winston Crum Insurance (“Frank
15 Winston”), an insurance company whose principal place of business is in the State of Florida,
16 provides Coolway with a comprehensive general liability insurance policy. ¶¶ 2, 24. Per the
17 agreement between Coolway and ORHP, the Frank Winston insurance policy names ORHP as an
18 additional insured. ¶¶ 23, 25, Ex. B. On January 30, 2019, ORHP gave written notice of the
19 Peshaks’ claims to Frank Winston. ¶ 22.

20 On June 13, 2019, the Peshaks filed a petition in Texas (the “Peshak Action”) alleging that
21 Coolway negligently caused property damage and that ORHP was responsible for such damage.
22 ¶¶ 27-28. ORHP tendered the defense to Frank Winston, who was obligated to appoint counsel to
23 defend and indemnify ORHP. ¶¶ 29-30. Frank Winston accepted the defense of ORHP and
24 appointed the law firm Galloway, Johnson, Tompkins, Burr & Smith (the “Galloway Firm”) to
25 defend ORHP. ¶¶ 31-32. The Galloway Firm has represented ORHP in the Peshak Action for
26 more than four years. ¶ 33. The Peshak Action has since been sent to arbitration and in June
27 2023, the Galloway Firm advised ORHP that it would be representing both ORHP and Coolway in
28 the upcoming arbitration. ¶¶ 33-34. ORHP objected to the joint representation, arguing that the

1 Galloway Firm has an actual conflict of interest in simultaneous representation and that such joint
2 representation violates the Rules of Professional Conduct for Texas lawyers. ¶ 36. Frank Winston
3 has failed to respond to ORHP's demands that Frank Winston appoint separate and independent
4 counsel to represent ORHP in the arbitration. ¶¶ 37-41.

5 **B. Procedural Background**

6 On September 11, 2023, ORHP filed the instant complaint against Frank Winston in the
7 Superior Court of California, County of Contra Costa. ECF 1-2. On October 18, 2023, Frank
8 Winston timely removed the case to this Court under diversity jurisdiction. ECF 1. ORHP brings
9 two causes of action against Frank Winston for breach of the covenant of good faith and fair
10 dealing and declaratory relief that ORHP is entitled to a court order compelling Frank Winston to
11 appoint separate and independent counsel to represent ORHP in the arbitration. Compl. ¶¶ 42-52.
12 Frank Winston moved to dismiss the complaint, arguing that (1) it is not subject to personal
13 jurisdiction in California; (2) venue is improper; (3) transfer is appropriate; and (4) the complaint
14 fails to state a claim. ECF 10, 11.

15 **II. DISCUSSION**

16 The Court begins its analysis of Frank Winston's motion to dismiss by considering
17 whether there is personal jurisdiction over Frank Winston, as jurisdiction is a threshold issue. *See*
18 *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 862-63 (9th Cir. 2021).

19 Generally, a district court has personal jurisdiction over a defendant "if it is permitted by a
20 long-arm statute and if the exercise of that jurisdiction does not violate federal due process."
21 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). California's long-arm statute
22 permits jurisdiction to the full extent the due process clause allows. *Williams v. Yamaha Motor*
23 *Co.*, 851 F.3d 1015, 1020 (9th Cir. 2017); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*
24 *L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006); Cal. Code. Civ. Proc. § 410.10. "Because
25 California's long-arm jurisdictional statute is coextensive with federal due process requirements,
26 the jurisdictional analyses under state law and federal due process are the same." *Schwarzenegger*
27 *v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004). In reviewing the "nature and
28 extent of the defendant's relationship with the forum state," the Supreme Court recognizes two

1 types of personal jurisdiction: general and specific jurisdiction. *Ford Motor Co. v. Mont. Eighth*
2 *Jud. Dist. Ct.*, 592 U.S. 351, 352 (2021) (internal quotation marks and citation omitted).
3 “[P]laintiff bears the burden of demonstrating that the court has jurisdiction over the defendant.”
4 *Pebble Beach*, 453 F.3d at 1154; *see also Schwarzenegger*, 374 F.3d at 800 (same). Although the
5 briefing is not clear on this point, the Court understands ORHP to argue that Frank Winston is
6 subject to both general and jurisdiction and thus addresses each in turn.

7 **1. General Jurisdiction**

8 General jurisdiction “extends to ‘any and all claims’ brought against a defendant,” but it is
9 appropriate only “when a defendant is ‘essentially at home’ in the State.” *Ford Motor Co.*, 592
10 U.S. at 358 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919
11 (2011)). Frank Winston is a corporation with a principal place of business in Florida that was
12 “organized and exist[s]” in Florida. Compl. ¶ 2; Gerdes Decl. (ECF 10-1) ¶ 2. It has no offices,
13 operations, employees, or physical presence in California. Gerdes Decl. ¶ 3. ORHP argues that
14 because Frank Winston has filed statements of information in California, it is subject to general
15 jurisdiction here.² “Opp.” (ECF 13) at 11-12. Not so. The law is clear that a corporate defendant
16 is subject to general jurisdiction in the state in which it is incorporated and maintains a principal
17 place of business. *Briskin v. Shopify, Inc.*, 87 F.4th 404, 411 (9th Cir. 2023) (citing *Daimler AG v.*
18 *Bauman*, 571 U.S. 117, 137 (2014)). Frank Winston is neither incorporated in California nor does
19 it maintain its principal place of business in California. Moreover, merely “doing business,” even
20 if such business is “substantial, continuous, and systematic,” is not enough to confer general
21 jurisdiction over a company. *See Daimler*, 571 U.S. at 138, 139 n.20. Thus, the Court finds that
22 there is no general jurisdiction over Frank Winston and next considers whether it can exercise
23 specific jurisdiction.

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27 ² The Court takes judicial notice of the Statement and Designation, Statement of Information, and
28 information for Frank Winston’s insurance license, ECF 16, as these are matters of public record.
Lee v. City of Los Angeles, 250 F.3d 668, 689-690 (9th Cir. 2001).

1 **2. Specific Jurisdiction**

2 Specific jurisdiction depends on the relationship between “the defendant, the forum, and
3 the litigation.” *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014) (citation omitted). In the Ninth
4 Circuit, courts use a three-prong test to analyze whether specific personal jurisdiction exists over a
5 non-resident defendant. *Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma*,
6 S.A., 972 F.3d 1101, 1107 (9th Cir. 2020). First, the defendant must “purposefully direct his
7 activities” at the forum or “perform some act by which he purposefully avails himself of the
8 privilege of conducting activities in the forum.” *Id.* (citation omitted). Next, the claim must “arise
9 out of or relate to” those forum-related activities. *Id.* Finally, the exercise of jurisdiction must
10 comport with fair play and substantial justice – in other words, it must be reasonable. *Id.* at 1109;
11 *see Williams*, 851 F.3d at 1023 (citation omitted). The plaintiff has the burden of satisfying the
12 first two prongs of the “minimum contacts” test. *Pebble Beach*, 453 F.3d at 1154. If the plaintiff
13 satisfies the first two prongs, the burden shifts to the defendant to “present a compelling case” that
14 jurisdiction would not be reasonable. *Schwarzenegger*, 374 F.3d at 802 (quoting *Burger King*
15 *Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)). The Court first examines whether Plaintiff has
16 satisfied the first two prongs of the minimum contacts test. As Plaintiff does not satisfy these
17 prongs, the Court need not look further.

18 Under the first prong of the specific jurisdiction analysis, “the defendant must purposefully
19 direct its activities toward the forum state, purposefully avail itself of the privileges of conducting
20 activities there, or engage in ‘some combination thereof.’” *Impossible Foods Inc. v. Impossible X*
21 *LLC*, 80 F.4th 1079, 1088 (9th Cir. 2023) (citing *Yahoo!*, 433 F.3d at 1206). Where, as here, the
22 underlying claim sounds in contract, courts focus on defendant’s purposeful availment. *Ayla, LLC*
23 *v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 979 (9th Cir. 2021). “A showing that a defendant
24 purposefully availed himself of the privilege of doing business in a forum state typically consists
25 of evidence of the defendant’s actions in the forum, such as executing or performing a contract
26 there.” *Schwarzenegger*, 374 F.3d at 802. However, the “mere existence of a contract with a
27 party in the forum state” is not enough. *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir.
28 1990) (citing *Burger King*, 471 U.S. at 478). Rather, courts consider ““prior negotiations and

United States District Court
Northern District of California

1 contemplated future consequences, along with the terms of the contract and the parties' actual
2 course of dealing' to determine if the defendant's contacts are 'substantial' and not merely
3 'random, fortuitous, or attenuated.'" *Id.* (quoting *Burger King*, 471 U.S. at 479-80).

4 ORHP argues that because Frank Winston made ORHP an additional insured under its
5 policy and is licensed to do work in California, Frank Winston is subject to specific jurisdiction.
6 Opp. at 12. The Court cannot agree. The mere fact that Frank Winston included ORHP, a
7 California corporation, on its insurance policy is insufficient to show purposeful availment. *See*
8 *Sher*, 911 F.2d at 1362; *Burger King*, 471 U.S. at 479-80. Indeed, the named insured on the
9 policy, Coolway, is a Texas Corporation. *See* Compl., Exs. B, C, D. ORHP has not pointed to
10 policy language suggesting that any coverage will be carried out in California. Moreover, the
11 claims against Frank Winston arise out of its failure to appoint independent counsel in a Texas
12 action in violation of the Texas Rules of Professional Conduct. Compl. ¶ 36.³ Because ORHP has
13 failed to plead any factual allegations showing that Frank Winston purposefully availed itself of
14 the benefits of doing business in California, directed any activities toward California, or that the
15 claims arose out of or relate to any forum-related activities, the Court cannot find specific
16 jurisdiction over Frank Winston. *See Glob. Commodities*, 972 F.3d at 1107. Accordingly, the
17 Court **GRANTS** Defendant's motion to dismiss for lack of personal jurisdiction. Although it
18 seems unlikely that ORHP will be able to amend its complaint to allege sufficient facts to confer
19 personal jurisdiction over Frank Winston, the Court nonetheless grants such leave pursuant to the
20 Ninth Circuit's direction. *See Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir.
21 1989).

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26 ³ ORHP notes that the relevant Rule of Professional Conduct in Texas is the same in California.
27 Opp. at 9. However, that is irrelevant to whether Frank Winston purposefully availed itself of the
28 benefits of California, or whether the claims at issue arose out of Frank Winston's contacts with
California.

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS** Frank Winston's motion to dismiss for lack
3 of personal jurisdiction. Leave to amend is granted solely to add new jurisdictional allegations.
4 Any amended complaint shall be filed by **June 13, 2024**.

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7 **IT IS SO ORDERED.**

8 Dated: May 14, 2024

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ARACELI MARTÍNEZ-OLGUÍN
United States District Judge